

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules

OAR chapter 436:

Division 120, Vocational Assistance to Injured Workers

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	July 27, 2016, 8:30 a.m. to 4 p.m. Pacific Daylight Time Room F (a.m.) and Room 260 (p.m.), Labor and Industries Building, Salem, Oregon Teleconference: 213-787-0529 Access code, 9221262#
Facilitator:	Fred Bruyns, Workers' Compensation Division
8:30 to 8:40	Welcome and introductions; meeting objectives
8:40 to 10:00	Discussion of issues – see attached
10:00 to 10:15	Break
10:15 to 11:30	Discussion of issues continued
11:30 to 1:00	Break for lunch hour – there will be a room change
1:00 to 2:30	(in Room 260) Discussion of issues continued
2:30 to 2:45	Break
2:45 to 3:50	Discussion of issues continued; request for related issues, discussion
3:50 to 4:00	Summing up next steps thank you!

Attached:

- [Issues document for OAR 436-120](#)
- [Extra issue: Work Experience Program Participants, Apprentices and Trainees](#)

OAR 436-120, Vocational Assistance to Injured Workers
Issues Document
For Stakeholder Advisory Committee, 7/27/16

INTRODUCTION

In late 2015, the Workers' Compensation Division considered proposing a legislative concept for the 2017 legislative session that would have: established a date certain by which eligibility for vocational assistance must be determined; allowed reimbursement from the Workers' Benefit Fund for the costs of certain vocational services provided to eligible workers; and extended the maximum length of vocational training plans and time loss payable during training to 24 months.

The division is not moving forward with statutory changes, but rather is focusing on possible rule changes with the following goals:

- Facilitate access to benefits for workers who meet eligibility criteria
- Improve timeliness throughout the process
- Enhance communication between the parties
- Improve the clarity and readability of the rules

Listed below are several issues – grouped by topic – aimed at these goals, as well as other issues that date back as far as 2012, when these rules were last revised in their entirety.

The division would like the committee's feedback on the issues, and welcomes other suggestions for making improvements in the vocational assistance process.

LIKELY ELIGIBLE / ACCESS TO BENEFITS

ISSUE #1: “Likely eligible”

Affected Rule: 436-120-0005(10)

Issue: The current definition and application of the concept of “likely eligible” makes it difficult to identify a date certain by which the eligibility evaluation process must begin.

Background: ORS 656.340(1)(a) and (b) provide:

(1)(a) The insurer or self-insured employer shall cause vocational assistance to be provided to an injured worker who is eligible for assistance in returning to work.

(b) For this purpose the insurer or self-insured employer shall contact a worker with a claim for a disabling compensable injury or claim for aggravation for evaluation of the worker’s eligibility for vocational assistance within five days of:

(A) Having knowledge of the worker’s likely eligibility for vocational assistance, from a medical or investigation report, notification from the worker, or otherwise; or

(B) The time the worker is medically stationary, if the worker has not returned to or been released for the worker’s regular employment or has not returned to other suitable employment with the employer at the time of injury or aggravation and the worker is not receiving vocational assistance.

In 2009, the division adopted a definition of “likely eligible” which now provides:

“Likely eligible” means the worker will be unable to return to regular or other suitable work with the employer-at-injury or aggravation or is unable to perform all of the duties of the regular or suitable work and it is reasonable to believe that the barriers are caused by the injury or aggravation.

The date a worker is “likely eligible” is not always clear, which makes it difficult to enforce timeframes and can ultimately delay benefits to workers. Under the current definition, a worker may be medically stationary but not “likely eligible.”

Another interpretation is that ORS 656.340(1)(b)(A) applies only before the worker is medically stationary. This would most often be a severe injury when it is clear the worker will not be able to return to work. If the worker has been declared medically stationary, then ORS 656.340(1)(b)(B) applies and the process must begin.

Alternatives:

- Revise the definition of “likely eligible” to apply only when the worker is not yet medically stationary
- Remove the definition from this rule and explain the concept in 436-120-0115 (Conditions Requiring Completion of a Vocational Eligibility Evaluation)

- Explore other ways to pinpoint when the eligibility evaluation process must begin
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #2: New notice for likely eligibility

Affected Rule: 436-120-0017

Issue: A stakeholder has suggested that a likely eligible determination require an associated notice to the worker.

Background: Under the current rules there is no requirement that the insurer notify the worker that the worker has been determined likely eligible for assistance. The stakeholder has suggested that a Notice of Likely Eligibility be sent that informs the worker of potential services the worker may be giving up if the worker agrees to settle his or her claim before eligibility has been determined.

If the definition of “likely eligible” is changed as discussed above, such a notice may not be needed because the worker would be referred for an eligibility evaluation within a few days of being declared medically stationary.

Alternatives:

- Amend the rules to require a Notice of Likely Eligible
- Amend the rules so the worker is advised they are giving up rights to vocational assistance when they settle their claim
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #3: Availability in Oregon

Affected Rule: 436-120-0145(2)(b)

Issue: With the ease of electronic communication and online training, it may no longer be necessary that the worker be physically available in Oregon to receive training.

Background: If the worker has an Oregon injury and meets eligibility criteria, the worker should be entitled to assistance if the worker wants it and is willing to participate remotely.

If the requirement is removed, then paragraphs (A) and (B) can also be deleted.

If paragraph (2)(b)(B) remains in the rule, a stakeholder raised the issue that it contains several double negatives and the intent is not clear.

If the rule is changed to no longer require the worker to be available in Oregon, 436-120-0175(4) will need to be revised and 436-120-0443(10) can be removed.

Alternatives:

- Remove the requirement that the worker be available in Oregon; make conforming changes to other rules that refer to the requirement
- Include and define availability in the worker responsibilities (120-0520(1))
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #4: Extended training plans

Affected Rule: 436-120-0443(3), (14)(b), (14)(c); 436-120-0445(1), (2)(a), (3)(a), (4)(a)

Issue: The rules should allow more flexibility for extended training plans. The current limit on training plans is not adequate for many workers to get the training they need.

Background: ORS 656.340(12) provides:

“Notwithstanding ORS 656.268, a worker actively engaged in training may receive temporary disability compensation for a maximum of 16 months. The insurer or self-insured employer may voluntarily extend the payment of temporary disability compensation to a maximum of 21 months. The director may order the payment of temporary disability compensation for up to 21 months upon good cause shown by the injured worker. The costs related to vocational assistance training programs may be paid for periods longer than 21 months, but in no event may temporary disability benefits be paid for a period longer than 21 months.”

This language limits time loss during training to 16 months, subject to extension to 21 months by the insurer or by order of the director for good cause. The statute does not otherwise limit the length of the training plan itself.

OAR 436-120-0445 limits various types of training; the maximum is 16 months for formal training unless extended by the insurer. OAR 436-120-0443(14) allows training costs to be paid for more than 21 months. The division has heard that 16-month training plans are often not adequate, but longer training plans are not often approved. The focus should be on the content of the training and whether it is adequate to enable the worker to seek suitable employment upon completion.

If an extended training plan is allowed, the worker needs to understand that time loss benefits are limited.

OAR 436-120-0443(3) may also need to be change. It provides: “The selection of plan objectives and the kind of training must attempt to minimize the length and cost of training necessary to prepare the worker for suitable employment.”

Alternatives:

- Revise the rule to allow more flexibility for longer training plans
- Revise the rule to increase the limits on specific types of training – basic education, on-the-job training, occupational skills training, and formal training
- No change
-

Fiscal Impacts, including cost of compliance for small business:

Allowing extended training plans may impact the spending limits in 436-120-0720.

ISSUE #5: Extension of training for exceptional loss of earning capacity

Affected Rule: 436-120-0443(14)

Issue: Should the rule be clarified as a result of the final contested case hearing order in [*Kristine D. Hamilton*](#), 20 CCHR 12 (2015)?

Background: In the *Hamilton* order, the director found that the Employment Services Team and Administrative Law Judge applied the incorrect legal standard when they looked to the entry-level wage rather than looking to the wage the plan would “allow” the worker to earn.

Also see 436-120-0400(1)(b), which includes potential for income growth as a factor in determining whether the worker needs training to return to employment that pays a wage significantly closer to 100% of the adjusted weekly wage.

Alternatives:

- Expand the 2nd sentence of subsection (14)(c) to include the potential for the worker to earn, within five years of completing training, a wage at least 10% greater than could be expected with a shorter training plan
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #6: Appropriateness of plans

Affected Rule: 436-120-0400, 436-120-0430, 436-120-0443, 436-120-0500, 436-120-0510, 436-120-0530

Issue: The rules should reiterate that return-to-work plans must be appropriate for the worker.

Background: The division has seen several cases in which the plan was not appropriate for the worker. A plan should take into account the worker's background, including criminal history, aptitude, and physical restrictions, and the objective should be realistic.

Alternatives:

- Amend the rule to clarify that a return-to-work plan and objective must be appropriate for the worker and realistic
- No change
-

Fiscal Impacts, including cost of compliance for small business:

TIMEFRAMES

ISSUE #7: Notice of results of eligibility evaluation

Affected Rule: 436-120-0017(1), 436-120-0135(6)

Issue: There is no timeframe in which the insurer must notify the worker of the results of the eligibility evaluation.

Background: There is a timeframe for when the eligibility determination process must begin and when it must be completed, but no timeframe for when the worker must be notified of the results. There may be some delay while the insurer reviews the recommendation from the counselor, but the worker should be notified in a timely manner.

Alternatives:

- Revise the rule to include a 5-day (working days) timeframe in which to notify the worker of the results of the eligibility evaluation
- Revise the rule to include a 14-day timeframe in which to notify the worker of the results of the eligibility evaluation
- Another timeframe
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #8: Postponements

Affected Rule: 436-120-0018, 436-120-0125, 436-120-0135

Issue: The division is considering disallowing postponements of eligibility evaluations.

Background: The current rules allow the insurer to postpone the eligibility evaluation until the worker is medically stationary or until the worker's permanent restrictions are known or can be projected, or because of insufficient data. If the eligibility determination is postponed, it must be completed within 30 days of the insurer's receipt of the relevant information.

ORS 656.340(1)(b) and (4) provide the timeframes for when the process must begin – if the criteria are met – and when the process must be completed, and provides no exceptions.

The division would like to hear from the committee on this issue, including some reasons why an eligibility evaluation would need to be postponed.

Alternatives:

- Revise the rules to not allow postponements
- Revise the rule to provide that if the worker requests an early eligibility determination, the insurer can deny the request as premature but not deny eligibility
- Delete any cross-references to postponements (0135(4) and (5))
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #9: Choosing and changing providers

Affected Rule: 436-120-0185

Issue: The timeframe for choosing a provider is too long.

Background: The current rule allows the insurer 20 days to notify the worker of the selection of vocational assistance provider. Presumably, in most cases, the same counselor that did the eligibility evaluation will be used to develop the plan. If the worker agrees to use that counselor, the process should not take a full 20 days. On the other hand, if the worker objects to the insurer's choice, the worker may need additional time to research other providers.

Alternatives:

- Reduce the 20-day timeframe for the insurer to notify the worker of the selection of provider to 14 or 7 days
- Add a 5-day timeframe in which the insurer must notify the director if the parties are unable to agree
- Clarify that the worker may object to the insurer's selection of provider, and provide that if the worker objects, the worker has 10 or 14 days in which to choose another provider
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #10: Return-to-work plan approval
Affected Rule: 436-120-0500

Issue: There is no timeframe for the insurer to notify the worker whether the plan is approved or denied.

Background: Prior to 12/1/07, the rule required the insurer to approve or reject a return-to-work plan within 14 days of receipt. Having a timeframe in place will help streamline the overall process. A stakeholder has also raised this as an issue.

Alternatives:

- Amend the rule to require the return-to-work plan to be approved or denied with 14 days
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #11: Timeframe for payment of direct worker purchases
Affected rule: 436-120-0700(5)

Issue: There is no timeframe for payment of direct worker purchases

Background: The rule requires the insurer to pay “in time to prevent delay in the provision of services,” but does not provide a specific timeframe. It might be helpful to specify the maximum number of days within which payment must be made.

Alternatives:

- Amend the rule to require payment for approved direct worker purchases no later than 14 days after approval
- Amend the rule to provide a different timeframe
- No change
-

Fiscal Impacts, including cost of compliance for small business:

COMMUNICATION

ISSUE #12: Notices and warnings

Affected Rule: 436-120-0012

Issue: Failure to send a copy of a notice to the worker's attorney.

Background: Section (2) says failure to send a copy of a notice to the worker's legal representative stays the appeal period until the representative gets a copy. This is different than the circumstance when the worker's attorney does not get a copy of the Notice of Closure (NOC). Rather than the appeal period being stayed, a NOC is not effective until it is sent to the worker and the worker's attorney. *See* OAR 436-030-0020(8), 436-030-0020(5); *Long v. Argonaut Ins. Co.*, 169 Or App 625 (2000). The division plans to word the 120 rule consistent with the 030 rules.

A corresponding change may also need to be made to 120-0008(1)(a).

Alternatives:

- Amend the rule to provide that a notice is not effective until it is mailed to all required parties, including the worker's attorney if the worker is represented
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #13: Reports to the director

Affected Rule: 436-120-0012, 436-120-0017

Issue: The insurer should notify the director at certain points during the eligibility determination process.

Background: Under ORS 656.340(10), the director may require reports of vocational assistance actions to assist in monitoring compliance to ensure timely and appropriate benefits. To enhance its ability to monitor that timeframes are being followed, the division would like to require insurers to report to the director when a worker is referred for an eligibility evaluation, and when a worker is found eligible or ineligible for assistance.

Alternatives:

- Amend the rules to clarify the requirements for insurers to notify the director of certain actions taken regarding vocational assistance

- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #14: New information

Affected rule: 436-120-0165(1), 436-120-0175

Issue: Require the insurer to notify the worker when it receives new information that may affect the worker's eligibility for vocational assistance.

Background: Adding this requirement will improve communication between the parties, and help keep the process on track.

Alternatives:

- Amend the rule to require the insurer to notify the worker when it receives new information that may affect eligibility
- Require the notification within a certain period of time, such as within five days of receiving the information
- Require the insurer to also notify the director
- No change
-

Fiscal Impacts, including cost of compliance for small business:

SUITABLE EMPLOYMENT

ISSUE #15: Verification that employment is suitable

Affected Rule: 436-120-0145(2)(d), 436-120-0165(2)

Issue: The division should have the discretion to verify that a job is suitable.

Background: If the basis for a worker being found not eligible, or for ending a worker's eligibility, is because the worker has returned to suitable employment, the division wants to be able to verify that the employment meets the criteria of "suitable employment."

Alternatives:

- Amend the rule to provide that the division will verify that employment is suitable
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #16: Employer-activated use of PWP

Affected Rule: 436-120-0005(18), 436-120-0165(2)

Issue: There are a number of issues related to employer-activated use of the Preferred Worker Program.

Background:

- The bulk of the language in 120-0005(18)(f) seems more appropriately placed in 120-0165(2) than in the definition of "suitable employment."
- One proposal that has been made is to modify (A) and (B) as follows:

(A) ~~Twelve~~ **Nine** months from the effective date of the premium exemption if there are no worksite modifications, or **the worker is terminated for cause or the worker voluntarily resigns for a reason unrelated to the work injury during the twelve month period, or**

(B) Twelve months from the date the department determines the worksite modification is complete, **or the worker is terminated for cause or the worker voluntarily resigns for a reason unrelated to the work injury during the twelve month period.**

Alternatives:

- Amend the rule as suggested
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ELIGIBILITY / END OF ELIGIBILITY

ISSUE #17: Suitable wage

Affected Rule: 436-120-0007

Issue: This issue is a placeholder. The following may impact the rule for determining a suitable wage:

Background:

- The final order in the contested case of [*Jessie L. Chu*](#), 20 CCHR 48 (2015), is on appeal to the Court of Appeals. The worker is challenging the exclusion of wages from multiple jobs in the calculation of her suitable wage for purposes of determining eligibility for vocational assistance. The question on review is whether "regular employment" as that term is used in ORS 656.340(5) is limited to the specific job in which the worker was engaged at the time of injury, or more generally refers to all of the employment the worker held at the time of injury to provide for her sustenance and support? As of July 7, 2016, the case is being briefed and oral argument is yet to be scheduled.
- OAR 436-060-0025, Rate Of Temporary Disability Compensation, specifically the method for calculating time loss, will be revised. Any changes to that rule will need to be reviewed to determine if there is any impact on the calculation of the adjusted weekly wage to determine suitable wage.

Alternatives:

- Revise the rule as necessary based on the court case and revisions to 060-0025
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #18: Ending eligibility

Affected Rule: 436-120-0165(9), ending eligibility

Issue: A stakeholder has suggested the rule be revised to clarify that the worker's eligibility may be ended for failing to participate in a return-to-work plan.

Background: The division would like the committee's feedback on whether this change is needed. The rule currently provides that eligibility ends when the worker fails to participate in the development or implementation of a return-to-work plan.

OAR 436-120-0145(3) (eligibility criteria) requires the worker to participate in the vocational assistance process and provide relevant information. If the worker does not, the insurer must issue a written warning before finding the worker ineligible.

OAR 436-120-0520(1) provides, “The worker must participate *** throughout plan development and as required in the [return-to-work] plan.”

Also, a worker’s benefits may be reduced for failure to participate in or complete a vocational rehabilitation program prescribed under ORS chapter 656. ORS 656.325(4).

Alternatives:

- Amend the rule to clarify that a worker’s eligibility may be ended for failing to participate in a return-to-work plan
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #19: Ending eligibility

Affected Rule: 436-120-0165(14)

Issue: A stakeholder has suggested adding the following two reasons for ending eligibility without prior written warning:

- The worker assaults or is abusive to classmates, teachers, supervisors, or others involved in the vocational assistance process.
- The worker is suspended or expelled from training.

Background: Under the current rule, the insurer must issue a written warning before ending eligibility for harassing any participant in the vocational assistance process; classmates, teachers, and supervisors arguably are not participants in the process. If the worker is assaultive or abusive during training, presumably the school’s disciplinary process would be followed.

It would be helpful to hear some examples from insurers or counselors of cases in which the worker was abusive, suspended, or expelled, and reasons against issuing a written warning prior to ending eligibility.

Alternatives:

- Amend the rule to allow eligibility to be ended if the worker is abusive to other classmates, teachers, or supervisors
- Define “abusive”
- Add a section providing that if the worker is suspended or expelled, eligibility will end
- Provide criteria for when a prior written warning is or is not required
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #20: Failure to maintain GPA or complete minimum credit hours

Affected Rule: 436-120-0448(2)

Issue: A written warning should not necessarily be required at the first indication the worker may not maintain a 2.0 grade point average or complete the minimum credit hours.

Background: A written warning should be required before training is ended, but if the insurer or counselor and the worker are all aware of any issues and are already working together on a plan to address them, the insurer should not be required to issue a written warning. Rather, the rule should allow some discretion depending on the circumstances.

Alternatives:

- Amend the rule to provide that the insurer “may” give the worker a written warning
- Amend the rule to provide that the written warning be given before training is ended, rather than at the first indication
- Amend the rule to provide circumstances when written warning would and would not be appropriate
- No change
-

Fiscal Impacts, including cost of compliance for small business:

RIGHTS AND RESPONSIBILITIES

ISSUE #21: Notices of eligibility

Affected Rule: 436-120-0017(1)(c)

Issue: The rule does not specify what rights and responsibilities must be included in the Notice of Eligibility.

Background: A stakeholder raised this issue. She has been including a copy of the 2nd page of the [1081](#) return-to-work plan form; another counselor includes the appeal rights; others may include something else entirely. The current language leaves it to the counselor to decide, creating inconsistency in application. Rights and responsibilities may differ, depending on whether the worker is eligible for training or direct employment services.

See the next issue regarding 436-120-0520, Return-to-Work Plan: Responsibilities of the Eligible Worker and the Vocational Assistance Provider.

Alternatives:

- Specify which rights and responsibilities must be included with the Notice of Eligibility, for training and for direct employment services
- Include the responsibilities listed on the back of form [1081](#) (Return-to-Work Plan; Training) or form [1083](#) (Return-to-Work Plan; Direct Employment)
- Refer to the responsibilities listed in 436-120-0520 (see next issue)
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #22: Worker and counselor responsibilities

Affected Rule: 436-120-0520

Issue:

- The responsibilities listed in the rule do not match the responsibilities listed on the back of the 1081 form, [Return-to-Work Plan; Training](#), and 1083 form, [Return-to-Work Plan; Direct Employment](#).
- Stakeholders have suggested that the rules require the worker to be an active participant in their job search, and all aspects of their plan.

Background: The rules require the worker to participate in plan development (120-0520(1)), and provide that eligibility may be ended if the worker does not participate in the development or implementation of a plan (120-0165(9)), but do not directly require the worker to be an active participant in their job search. It is common for counselors to specify a minimum number of job search contacts (such as 10) per week. While the requirement is written into the plan itself, it should also be in the rules.

OAR 436-120-0520(1) provides, “The worker must participate *** throughout plan development and as required in the [return-to-work] plan.”

Also, a worker’s benefits may be reduced for failure to participate in or complete a vocational rehabilitation program prescribed under ORS chapter 656. ORS 656.325(4).

Alternatives:

- List in rule the responsibilities of the worker as listed on the 1081 and 1083 forms
- List in rule the responsibilities of the counselor as listed on the 1081 and 1083 forms
- Revise the rule to require the worker to actively participate in all aspects of their return-to-work plan
- Revise the rule to require the worker to be an active participant in their job search
- No change
-

Fiscal Impacts, including cost of compliance for small business:

DEFINITIONS

ISSUE #23: Timeliness of documents; “delivered,” “filed,” “mailed”

Affected Rule: 436-120-0003(7); 436-120-0005(4), (8), (11)

Issue: There is a lack of consistency throughout chapter 436 in the rules regarding timely submission of documents to the division.

Background: The division is looking at making general rules throughout chapter 436 consistent. Other definitions of these terms in chapters 436 and 438 include:

- 436-001-0004(1)(h) defines “mailed” as “addressed to the last known address, with sufficient postage and placed in the custody of the U. S. Postal Service.”
- Divisions 001, 009, 010, and 030 define mailing date as the date a document is postmarked.
- WCB rule 438-005-0046(1)(a) defines “filing” as physical delivery or date of mailing, and (1)(j) provides, “[F]iling *** may be accomplished by mailing by first class mail, postage prepaid. An attorney's certificate that a thing was deposited in the mail on a stated date is proof of mailing on that date. If the thing is not received within the prescribed time and no certificate of mailing is furnished, it shall be presumed that the filing was untimely unless the filing party establishes that the filing was timely.”

The definition of “mailed” was raised in 2009, and the stakeholder advisory committee at that time preferred the definition in the 120 rules over the definition in the 001 rules, so it was not changed. Would there be any unintended consequences of making the 120 language consistent with the other rules in chapter 436?

The division also plans to remove unintended barriers to electronic communication throughout chapter 436.

Alternatives:

- Remove the language regarding timeliness from the applicability rule (120-0003(7))
- Make the timeliness language in 120 consistent with other rules in chapter 436
- Combine timeliness language with definitions of “delivered,” “filed,” and “mailed”
- Revise the definitions of “delivered,” “filed,” and “mailed”
- Remove any barriers to electronic communication
- No change

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Fiscal Impacts, including cost of compliance for small business:

ISSUE #24: Definition of “insurer”

Affected Rule: 436-120-0005(9)

Issue: “Insurer” is defined in ORS 656.005(14).

Background: The division tries not to unnecessarily duplicate statutory language in rule. If the definition of “insurer” is removed from the rules, the last sentence could be moved to 436-120-0012, General Requirements For Notices and Warnings. The rules may still need to clarify that when the term “insurer” is used, it includes a “self-insured employer.”

Alternatives:

- Remove the definition of “insurer”
- Move the last sentence to 436-120-0012
- Clarify that “insurer” includes “self-insured employer”
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #25: Physical demand characteristics of work strength ratings

Affected Rule: 436-120-0005(13)

Issue: The terms and concepts are defined, but are not used anywhere in the rules.

Background: The terms and concepts are commonly used for substantial handicap analyses, job analyses, and physical capacities evaluations. However, since they are not used anywhere in the 120 rules, they should not be defined in 120-0005. The division would like the committee’s input on whether the language should be kept in the rules (but moved to a different rule number), or whether it can be removed altogether. Do parties refer to or rely on the 120 definitions of these terms?

Alternatives:

- Remove the definitions
- Move the definitions to 120-0340, Determining Substantial Handicap
- Provide context for the concepts; explain what they apply to
- Refer to a standard definition. Is there something more current than the DOT?
- No change
-

Fiscal Impacts, including cost of compliance for small business:

OTHER ISSUES

ISSUE #26: Reemployment and reinstatement rights

Affected Rule: 436-120-0014

Issue: The requirement for insurers to inform workers of their reinstatement rights is a claims processing matter, not specific to the vocational assistance process.

Background: Three sections of the statute require the insurer/self-insured employer to notify the worker of the reemployment and reinstatement rights under ORS chapter 659A:

- ORS 656.262(6)(b)(D) requires the notice of acceptance to inform the worker of reinstatement rights
- ORS 656.340(2) requires the contact under 656.340(1) to include information about reemployment rights
- ORS 656.340(3) requires the insurer or self-insured employer to inform the worker about reemployment and reinstatement rights within 5 days after the AP/ANP releases the worker to return to work

While part of the requirement is stated in the section of the statute dealing with vocational assistance, it is a function of claims processing and is not specific to the vocational assistance process. It is unlikely insurers will look to the 120 rules to find the requirement.

Alternatives:

- Recommend adding the requirements to 060
- Keep the requirements found in 656.340(2) and (3) in the 120 rules, possibly moving them to the rule regarding notices
- No change
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Fiscal Impacts, including cost of compliance for small business:

ISSUE #27: List of vocational assistance providers

Affected Rule: 436-120-0017(1)(e)

Issue: The rule should allow the list to be provided electronically.

Background: ORS 656.340(10) provides, in part:

“The director shall compile a list of organizations or agencies registered to provide vocational assistance. A current list shall be distributed by the director to

all insurers and self-insured employers. The insurer shall send the list to each worker with the notice of eligibility.”

OAR 436-120-0017(1)(e) provides that the list is published with [Bulletin 151](#). The bulletin provides the link where users can find the list on the division’s website. The list is approximately 40 pages long.

Insurers should be allowed to provide the worker with information about how to access the list electronically, and be required to provide a paper copy upon request. This would be similar to what the rules require regarding a list of MCO providers. OAR 436-010-0270(4) requires the insurer to provide the worker a written list of eligible attending physicians within the MCO’s geographic service area, or provide a Web address to access the list. If the insurer does not provide a written list, the insurer must provide a phone number the worker can call to ask for a list and give the worker seven days to request the list.

Alternatives:

- Amend the rule to specify how to find the list on the division’s website
- Allow insurers to provide the worker information about how to access the list electronically, but require that a paper copy be provided upon request
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #28: Multiple claims

Affected Rule: 436-120-0135(7)

Issue: A stakeholder has suggested the rule clarify how to determine which claim has the most severe vocational impact.

Background: The rule provides that assistance be provided for only one claim at a time, the claim with “the most severe vocational impact,” but does not provide guidance for how to make that determination.

Alternatives:

- Revise the rule to clarify how to determine severity of vocational impact
 - Cost of plan to return worker to suitable employment

- Earning capacity
- Physical restrictions
- First claim
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #29: Employer-activated preferred worker benefits
Affected Rule: 436-120-0155

Issue: The language in (1)(a)(A) and (E) regarding start date is not clear and may conflict.

Background: The language in (1)(a) parallels the language in 436-110-0290(4) (Employer at Injury Use of the Preferred Worker Program), except that the 110 rule requires the job offer to include the start date, with the further provision: “If the job starts after the modifications are in place, so note.” The start date cannot be before the job is within the worker’s restrictions.

Also, section (2) may need to be clarified as to when the eligibility evaluation must be completed.

Alternatives:

- Amend the rule to clarify the start date and when the job begins
- Amend the rule to clarify when the eligibility evaluation must be completed
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #30: Redetermining eligibility
Affected Rule: 436-120-0175(6)

Issue: The circumstances in section (6) would not be a redetermination, but an initial determination.

Background: A stakeholder raised this issue, saying this may allow a worker who does not meet likely eligibility criteria to get an evaluation.

Alternatives:

- Revise or move the language in section (6)
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #31: Vocational evaluation

Affected Rule: 436-120-0410

Issue: The rule describing vocational evaluations needs to be updated.

Background: The vocational evaluation is done after the worker is determined eligible for assistance in order to determine what type of assistance to provide. The list of activities in the rule is out-of-date. For example, work evaluations, described in section (2), are no longer done. The division would like to update the rule to outline what the vocational counselor would reasonably be expected to do as part of the vocational evaluation.

Alternatives:

- Update the rule regarding vocational evaluation
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #32: Training

Affected Rule: 436-120-0443(2)

Issue: The rule does not explain what is meant by plan monitoring.

Background: It may be helpful if the language is expanded to explain what is meant by plan monitoring, and to add responsibilities that are listed on the 1081 form, [Return-to-Work Plan; Training](#).

Alternatives:

- Revise the rule as suggested
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #33: Time loss during training

Affected Rule: 436-120-0443(13)

Issue: The rule should clarify that the limit applies to each individual training program.

Background: [Intel Corp. v. Batchler](#), 267 Or App 782 (2014), interpreted ORS 656.268(10) and 656.340(12) and held that a worker is eligible to receive a maximum of 16 months of time loss benefits during each period of eligibility for training, not the life of the claim.

Alternatives:

- Revise the rule as follows: “Temporary disability compensation is limited, **for each eligibility period**, to 16 months unless extended to 21 months by the insurer or ordered by the director when the injured worker provides good cause.”
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #34: Direct worker purchases

Affected Rule: 436-120-0700(7)

Issue: A stakeholder has raised the issue of workers signing ownership agreements.

Background: Insurers have requested that workers sign ownership agreements; there is no rule requiring such agreements to be signed. The stakeholder’s concern is that with a signed

agreement, if the worker refuses to return property the insurer can take a credit against future benefits and can end eligibility.

Alternatives:

- Amend the rule to address or clarify ownership of direct worker purchases
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #35: Direct worker purchases

Affected Rule: 436-120-0710

Issue: The worker’s family income should not be a consideration.

Background: The rule requires the insurer to consider the worker’s financial circumstances in determining whether purchases described in sections (13) through (18) are necessary, and may require the worker to provide information about family income when the worker claims a financial hardship. Direct worker purchases should be provided if necessary for the worker to participate in assistance and to meet the requirements of a suitable job; the worker’s and the worker’s family’s financial circumstances should not be a factor.

Alternatives:

- Remove family income as a consideration
- Remove the worker’s net income as a consideration
- No change
-

Fiscal Impacts, including cost of compliance for small business:

FEE SCHEDULE

ISSUE #36: Fee schedule

Affected Rule: 436-120-0720

Issue: A stakeholder has suggested that the spending limits for direct worker purchases for training be significantly increased to reflect increased costs of tuition and books, especially in community colleges.

Background:

Alternatives:

- Increase spending limits for direct worker purchases for training
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #37: Fee schedule

Affected Rule: 436-120-0720

Issue: The fee schedule needs to be reviewed for updates and to see if it can be made more user-friendly.

Background: The director is required by ORS 656.340(9) to adopt a fee schedule:

- (9) The director shall adopt rules providing:
 - (e) Procedures, schedules and conditions relating to the payment for services performed by a vocational assistance provider, that are based on payment for specific services performed and not fees for services performed on an hourly basis. Fee schedules shall reflect a reasonable rate for direct worker purchases and for all vocational assistance providers and shall be the same within suitable geographic areas.

The current method of publishing the fee schedule is to publish in rule the limits as percentages of the state's average weekly wage, and publish dollar amounts in bulletin. Because the dollar amounts are adjusted annually, the rule does not need to be amended every year. However, the percentages are not very user-friendly.

Also, a suggestion has been made to shorten the timeframe in section (6) for payment of the provider's bill from 60 days to 30 days.

Alternatives:

- Revise the fee schedule to round the percentages up to whole numbers
- Revise the rule to delete unnecessary language in (4) and (5)
- In section (6), change the timeframe to 30 days
- No change
-

Fiscal Impacts, including cost of compliance for small business:

CERTIFICATION

ISSUE #38: Certification and renewal

Affected Rule: 436-120-0810 thru 436-120-0840

Issue:

- The requirements for initial certification and renewal need to be clarified and streamlined.
- A stakeholder asked whether teaching classes counts as continuing education credit toward renewal of certification under 120-0820.

Background: The director is required to certify individuals to provide vocational assistance. A certified individual performs the eligibility determination, substantial handicap evaluation, and vocational evaluation; develops return-to-work plans; provides direct employment services; and develops and monitors training plans. ORS 656.340(9) provides, in part:

- (9) The director shall adopt rules providing:
 - (a) Standards for and methods of certifying individuals qualified by education, training and experience to provide vocational assistance to injured workers;
 - (b) Standards for registration of vocational assistance providers;
 - (c) Conditions and procedures under which the certification of an individual to provide vocational assistance services or the registration of a vocational assistance provider may be suspended or revoked for failure to maintain compliance with the certification or registration standards;

ORS 656.340(13) defines “vocational assistance provider” as a public or private organization or agency that provides vocational assistance to injured workers.

Alternatives:

- Consolidate 120-0810, Certification of Individuals, and 120-0830, Classification of Vocational Assistance Staff, and remove redundant and unnecessary language
- Clarify that the requirements for renewal of certification under 120-0820 also apply to initial certification under 120-0810
- State whether teaching classes counts as continuing education
- No change
-

Fiscal Impacts, including cost of compliance for small business:

RULE ORGANIZATION – STREAMLINING AND CLARIFYING

ISSUE #39: Rule organization and format

Affected Rule: All rules

Issue: The division is looking at ways to improve the readability of the rules.

Background: The division has received feedback that the rules are not user-friendly and not arranged in a logical sequence. We welcome the committee's feedback on what would be most helpful.

Alternatives:

- Use headings and subheadings to improve navigability
- Arrange rules by chronological flow
- Arrange rules by insurer/worker responsibility
- Create a cheat sheet or crosswalk
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #40: Eligibility evaluations

Affected Rule: 436-120-0115, 436-120-0135

Issue: Several suggestions have been made to streamline and clarify the language regarding eligibility evaluations.

Background:

- Combine 120-0115, Conditions Requiring Completion of a Vocational Eligibility Evaluation, and 120-0135, General Requirements and Timeframes for Vocational Eligibility Evaluations, into one rule regarding eligibility evaluations.
- Move 120-0115(2) up, so the rule begins with the circumstances in which an eligibility evaluation is not required.
- Move 120-0115(4) (if the worker requests vocational assistance and the insurer is not required to determine eligibility) to another rule.

- Clarify 120-0115(5) by stating that the worker must otherwise meet the criteria.

Alternatives:

- Amend the rule as suggested
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #41: Reevaluating and ending a training plan

Affected Rule: 436-120-0448, 436-120-0449, 436-120-0451

Issue: These three rules that apply to reevaluating a training plan, ending and reevaluating a training plan, and ending a training plan are confusing.

Background: The division has received feedback that it is hard to determine when a training plan must be reevaluated as opposed to ended and reevaluated. The rule also does not provide guidance on what is required for a reevaluation; the counselor should always be monitoring and evaluating the plan.

Alternatives:

- Re-write the three rules to clarify
- Consolidate the three rules to streamline the language
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #42: Return-to-work plans

Affected Rule: 436-120-0500, 436-120-0510

Issue/Background: The requirements for return-to-work plans should be reviewed to make sure they are clear and in a logical sequence.

Alternatives:

- Amend the rules to clarify the requirements for a return-to-work plan
 - Clarify who is required to do what
 - Split up the language in 120-0500(1) and (2)
 - List the plan requirements in 120-0510(1) first
- Explain the difference between a return-to-work plan and a training plan
- No change
-

Fiscal Impacts, including cost of compliance for small business:

ISSUE #43: Direct worker purchases

Affected Rule: 436-120-0700, 436-120-0710

Issue: The rules regarding direct worker purchases should be streamlined and clarified.

Background:

- 120-0700(6) may fit better under a general category instead of direct worker purchases. It should also clarify the criteria for when the insurer must pay, and when the insurer can deny, reimbursement of these costs.
- 120-0710 may be more accurately labeled as “categories” than “kinds” of purchases.
- 120-0710(9) and (11) do not describe purchases, as stated in the introductory paragraph to the rule.

Alternatives:

- Revise the rules to streamline and clarify
- No change
-

Fiscal Impacts, including cost of compliance for small business:

BULLETIN / FORMS

ISSUE #44

- Bulletin [124](#)
 - Form [1081](#), Return-to-Work Plan; Training
 - Form [1083](#), Return-to-Work Plan; Direct Employment
 - Form [2800](#), Vocational Closure Report

Issue: The bulletin and forms should be reviewed for any needed updates as a result of rule changes or otherwise.

Background: This is a placeholder.

ISSUE #45

- [Form 1880](#), Vocational Assistance Certification Program, Individual Certification Under OAR 436-120
- [Form 2814](#), “Vocational Assistance Certification Program – Registration of Vocational Assistance Provider”

Issue: The forms should be reviewed for any needed revisions as a result of rule changes or otherwise.

Background: This is a placeholder.

HOUSEKEEPING CHANGES

- Throughout – remove “self-insured employer,” “injured”
- Throughout – remove “as defined in...” and “as determined under...” language
- Throughout – remove “certified” and “registered”
- 0003(4) – remove; stated in statute and 120-0115(2)
- 0003(5) – change “pursuant to” to “under”
- 0005(18)(d) – semi-colon in 2nd sentence
- 0005(18)(f) – clarify (C) and (D)
- 0008 – eliminate unnecessary language
- 0008(1)(b)(A) – semi-colon
- 0008(1)(g) – Revise the rule to state that a request for reconsideration must be *received* by the director before the administrative order becomes final, consistent with recent changes to [436-010-0008\(6\)\(a\)](#) related to medical service disputes. If a request is mailed on the last day and WCD does not receive it until after the administrative order becomes final, WCD can no longer reconsider the order.
- 0012(1) – each bullet should end with a semi-colon, not a period
- 0012 – Move the last sentence of the definition of “insurer”: A vocational assistance provider acting as the insurer's delegate may provide notices and warnings required by OAR 436-120.
- 0017, intro – “it must issue the corresponding notices, using the headings listed in this rule.”
- 0017(2)(a) – change “which” to “that”
- 0017(2)(b) – remove comma
- 0017(3)(a) – insert “at” and hyphens
- 0017(9)(a) – add quotes and comma
- 0017(10) – put “Vocational Closure Report” in caps and bold to highlight it
- 0115(1)(d) – add “a” and delete (s) (a new condition)
- 0115(2) – add reference for BOM
- 0115(4) – this section seems misplaced; remove (s) from (a)
- 0115(4)(c) – remove phone numbers
- 0135(1) – spell out 5
- 0145(2)(e), 0165(3) and (5) – make the reference to 436-060 more specific
- 0145(2)(f) – In the 2nd sentence, change the words “prior to ending the worker’s eligibility” to “prior to finding the worker ineligible.”
- 0145(4) – change “a matter material” to “information relevant”?
- 0165(3), (4), (5) – change “prior to” to “before”
- 0165(15) – 2nd sentence, approval “of the agreement”; 3rd sentence, move apostrophe
- 0175, intro – ineligible “for vocational assistance”; eligibility “for vocational assistance”
- 0185(1) – remove “self-insured employer”
- 0400(1)(b) – change “which” to “that,” add serial comma
- 0410(2) – the Commission was suspended in 2008; now the VEWA

- 0410(3) – add serial comma
- 0410(4)(a) – add serial commas
- 0410(7) – should “labor market search” be in bold?
- 0410(7)(a), (b), (c) – add serial commas, change semi-colon to comma
- 0443(11)(c) – clarify that it’s the worker’s illness or recuperation
- 0443(12) – remove 2nd ORS
- 0443(13) – remove “injured”
- 0443(14)(b), (c) – clarify that these are reasons to extend training, more than just definitions
- 0443(14)(b) – specify reference to 436-035
- 0443(14)(c) – why quotation marks?
- 0445(2), (3), (4) – underline and add colon
- 0445(2)(e), (3)(e) – “absent”
- 0445(3)(b) – The worker “may” not receive wages?
- 0445(4)(b) – “the worker’s abilities and limitations and the length of time”
- 0445(5) – remove 2nd ORS
- 0448(1)(a) – “render”
- 0448(2)(a), (b) – change “fail to” to “not”
- 0500(1) – change “prior to” to “before”; make reference to 436-010 more specific; in last sentence, if the insurer lacks sufficient information to make a decision about what?
- 0500(2) – 2nd sentence, change “will be” to “is”
- 0510(1) – change “includes consideration of” to “considers”
- 0510(2)(a) – remove parentheses
- 0520(1) – change “which” to “that”
- 0520(2)(a), (b) – add serial commas
- 0530(2) – remove parentheses
- 0530(3) – change “OAR 436-120” to “these rules”
- 0700(1), (2), (6) – add serial commas
- 0700(2) – change “will” to “do”
- 0700(3) – change “which” to “that,” “shall” to “must”
- 0700(7)(b) – is there a time limit?
- 0710(1) – change “will” to “may,” add serial comma
- 0710(2) – “stipulated”
- 0710(4) – change “will” to “may,” change “possesses” to “already has”
- 0710(5) – change “which” to “that,” change “pursuant to” to “under”
- 0710(10) – “were”
- 0710(11) – remove parentheses
- 0710(14) – “equivalent”
- 0720(1) – remove “if the insurer determines the individual case so warrants”
- 0720(2) – add comma, spell out DE
- 0720(3) – travel/wait
- 0800(1) – “they”
- 0800(2) – punctuation

- 0800(4)(a) – serial comma
- 0810(3)(a) – their
- 0820(1) – their; “prior to” to “before”
- 0820(1)(a) – remove “s”
- 0820(2) – serial comma, the, and to or
- 0830(4)(b)(D) – “which must include” to “that includes”
- 0830(6)(a) – add hyphens
- 0840(1)(f) – punctuation
- 0840(2)(c), (d), (e), (f), (h) – commas
- 0900(1) – comma
- 0900(2)(d) – only state “A civil penalty under ORS 656.745.”
- 0900(4) – move apostrophe
- 0915(1), (2)(b), (3)(d), (4) – serial commas
- 0915(4) – section (3) “of this rule”

OAR chapter 436

Work Experience Program Participants, Apprentices and Trainees

For 105, 110, and 120 Stakeholder Advisory Committees
7/19/16 and 7/27/16

Rule: Chapter 436, divisions 105, 110, 120

Issue: There are no rules in chapter 436 regarding how to determine eligibility and calculate benefits for injured individuals covered under:

- ORS 656.033, Participants in work experience or school directed professional training programs
- ORS 656.046, Persons in college work experience and professional education programs
- ORS 656.135, Deaf school work experience trainees
- ORS 656.138, Apprentices, trainees participating in related instruction classes

Background: Individuals covered under these sections who are injured while participating in the training program are entitled to workers' compensation benefits under ORS chapter 656. Individuals covered under ORS 656.033 and 656.046 are not entitled to time loss benefits, but the individuals are otherwise entitled to medical services, permanent disability, return to work, and vocational assistance. The filing of a claim for benefits is the exclusive remedy of the individual and any beneficiaries.

We do not know how many claims arise in these situations. However, for those claims that are filed, there are no rules to provide guidance for determining eligibility for and the amount of benefits. The actual benefits provided to the individuals may not be consistent. There may be some rules that inadvertently present roadblocks to these individuals being found eligible for the benefits to which they are otherwise entitled.

Issues specific to the 105, 110, and 120 rules include how to determine wage at injury, employer at injury, and job at injury. The rules related to claims processing (060) and PPD (030 and 035) may also be affected; the division will seek input from future advisory committees specific to those rules.

We would like your feedback related to this issue, including:

- Any direct experience you have with claims covered under one of these sections.
- What would be most helpful to provide guidance to parties in these claims?
- Should language be added to the 105, 110, or 120 rules for how to determine eligibility for EAIP, PWP, and vocational assistance benefits?

- If so, what elements should the rule include?
- Are there obstacles in any of the rules to these individuals and their “employers” being able to access the benefits they are entitled to by statute?